Case Western Reserve Law Review

Volume 13 | Issue 4

1962

# Home Rule and Land Use Control

Henry J. Crawford

# Home Rule and Land Use Control

*Henry J. Crawford*

## Unusual Opportunities in Ohio for the Development of Urban Renewal and Other Land Use Controls

In Ohio, the legal power of municipal corporations to undertake and carry out urban renewal programs and the related activities of land use planning and control is not dependent on the existence or enactment of statutes by the state legislature or on the adoption of a charter. The authority for these functions of municipal government is the self-executing constitutional grant of power to exercise the legislative sovereignty of the state in all matters of local self-government. This affords an unusual opportunity in Ohio to develop the objectives of municipal self-government, and to devise and put into effect measures to combat the growing blight that comes from haphazard urban growth, from neglect, and from indifference to the public welfare. Questions of substantial doubt in the undertaking of particular urban renewal projects or of other land use controls may well arise; but these, except as to procedural matters, will involve fundamental constitutional questions, not questions as to whether the state legislature has seen fit to authorize by statute the proposed project or controls, or to curtail the power of municipalities, or whether the municipality has transcended some statutory power delegated to it, or has adopted, with or without statutory sanction, a charter for its government.

THE AUTHOR (Ph.B., Kenyon College, L.L.B., Harvard University, L.L.D., Bowling Green State University) is a Cleveland attorney.

### *Home Rule in Ohio*

Municipal home rule in Ohio was written into the constitution in 1912. Article XVIII, section 3 provides as follows:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

This section contains two separate grants of power. The first is the authority to exercise all powers of "local self-government" and is not restricted by the final clause of this section relating to conflict with

general laws.[1] The second is "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." To be invalid as in conflict with general laws, the local regulation must conflict with a state regulation; the legislature may not by general law deny or restrict the municipal power to adopt such regulations. It may do so only by enacting laws imposing regulations which are themselves in conflict with those of the municipality.[2]

Therefore, within the entire area of "local self-government," municipalities can determine for themselves what is necessary for the public welfare and can adopt the means for carrying out programs they determine to be necessary, without any statutory authority. Generally speaking, this power is exercisable by municipalities, as far as concerns the question of public purpose, to the same extent as it is or may be in other states through the enactment of statutory authority to undertake a program for the public welfare. In other words, if a statute (absent the home rule power) could constitutionally authorize municipal land use controls and urban renewal projects as a part of them, municipalities in Ohio can adopt and enforce such controls and effect such projects without any statute at all.

It has been somewhat difficult for officials, planning consultants, and municipal legal advisors fully to appreciate that such statutory authority is completely superfluous. This is no doubt due to the common understanding that municipalities in the United States have only such powers as are conferred by statute. That is the usual rule,[3] but it has not been true in Ohio since 1912, when home rule was written into the constitution.

The grant of home rule power is self-executing and plenary except only as limited by parallel constitutional provisions. It supersedes the prior concept that municipal powers depend upon grants by the General Assembly. The general course of decisions in the Ohio Supreme Court establishes beyond question that a municipality's power of local self-government prevails in local affairs. Those decisions also establish that a municipality, acting through its duly constituted legislative authority, may undertake and carry out all programs for municipal improvement and may exercise all of the substantive powers of the sovereign when carrying out the city's governmental powers in the field of local self-

1. State *ex rel.* Leach v. Redick, 168 Ohio St. 543, 157 N.E.2d 106 (1959); State *ex rel.* Bidas v. Andrish, 165 Ohio St. 441, 136 N.E.2d 43 (1956); State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

2. Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929); Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917). For a full discussion, see 3 FARRELL-ELLIS, OHIO MUNICIPAL CODE §§ 1.29-.33 (11th ed. 1962).

3. 1 DILLON, MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).

government.[4] All of these municipal powers are exercised without benefit of statutory authority, and, in some cases, in violation of statutory restrictions upon the exercise of authority which were held to be not within the areas in which the legislature was expressly authorized to impose restrictions.

### *Home Rule and Urban Renewal*

These principles were recognized as applicable to an urban renewal project in the leading Ohio case on the subject.[5] The court had before it an urban redevelopment project for the elimination of slum conditions in the City of Cincinnati by acquiring and clearing an area and making the land available for redevelopment and subsequent resale for redevelopment with restrictions as to use, designed to insure against occurrence of slum conditions. The court held, in the eighth syllabus of the case:

> Where a redevelopment project is within the lawful purposes of a government, then such redevelopment project with respect to a slum area in a city is within the lawful purposes of the city government.[6]

Upon this point the opinion of Judge Taft is helpful. He said:

> Obviously, if a redevelopment project such as that in the instant case is within the lawful purposes of a government, then this redevelopment project is within the lawful purposes of the local government of the city of Cincinnati. There is no provision of the Ohio Constitution which authorizes the interference by general laws with the exercise by a municipality of its power of eminent domain, such as the provisions of Section 3 of Article XVIII requiring that "local police, sanitary and other similar regulations" be "not in conflict with general laws" and such as the provisions of Section 13 of Article XVIII authorizing the passage of laws limiting certain other powers of government otherwise vested in a municipality by section 3 of that article. . . .
>
> It follows that the questions, whether the provisions of the Urban Redevelopment Act have been complied with and whether that act is constitutional, are not pertinent to a consideration of this case.[7]

For this reason, the General Assembly, in 1961, repealed completely

4. State *ex rel.* Leach v. Redick, 168 Ohio St. 543, 157 N.E.2d 106 (1959) (lease of property); Benjamin v. City of Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957) (prohibition of nuisance); Babin v. City of Ashland, 160 Ohio St. 328, 116 N.E.2d 580 (1953) (disposition of property); State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953) (eminent domain); State *ex rel.* Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951) (off-street parking and non-debt bonds); State *ex rel.* McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951) (membership fees); Angell v. City of Toledo, 153 Ohio St. 179, 91 N.E.2d 250 (1950) (income tax); State *ex rel.* City of Toledo v. Weiler, 101 Ohio St. 123, 128 N.E. 88 (1920) (purpose of borrowing); Froelich v. City of Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919) (use of streets).

5. State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

6. *Id.* at 14, 110 N.E.2d at 781.

7. *Id.* at 32-33, 110 N.E.2d at 789.

the Ohio urban renewal statute, enacted in 1949,[8] which purported to authorize cities to undertake urban renewal projects. Consequently, there is now no statute in Ohio authorizing municipal urban renewal undertakings. Before the 1961 repeal,[9] there was the anomalous situation that cities were purportedly authorized to carry on such projects, but with the limitations imposed by the statute, while villages were authorized to carry them on without any statutory limitations, as the state statute did not apply to villages. It had been found that the purported grant of urban renewal powers by the 1949 enactment contained conditions or limitations which were interfering with the successful accomplishment by cities of urban renewal programs. Some of those conditions or limitations were invalid or of doubtful validity; others imposed impracticable restrictions.[10]

The conclusion to be drawn is that municipalities exercise directly the sovereignty of the state in dealing with Ohio municipal problems of urban renewal, planning, open space programs, zoning, building codes, and other land use controls.[11] There is the opportunity for each municipality to determine its own objectives and its concepts of desirable urban growth, development, and redevelopment, without the difficulties, delays, or even impossibilities of obtaining statutory authority to act in the area. Municipalities are free to try out new concepts for urban life and environment and new means of accomplishing the objectives of the community. It is believed that probably nowhere else in the United States does there exist equal freedom for municipal experiment for the promotion of the public welfare.

### *Responsibilities of Municipalities under Home Rule*

Perhaps of greater importance are the consequences of the thrusting, by the constitution, of the powers of local self-government upon municipal corporations. Such powers are necessarily accompanied by the cor-

8. 123 OHIO LAWS 433 (1949), codified as OHIO REV. CODE §§ 725.01-.11.

9. 129 OHIO LAWS, Senate Bill No. 254, effective April 24, 1961.

10. For example, adoption of a plan was made a condition of the exercise of the power; a redevelopment plan could not contain less than four acres; two public hearings were required; notice was to be mailed to each owner of land in the area; land acquisition was to be completed within two years, and disposition within six years; and leases could not extend beyond three years or the date of completion of redevelopment work. 123 OHIO LAWS 433 (1949), codified as OHIO REV. CODE §§ 725.01-.11.

11. Urban renewal projects undertaken by counties require statutory authority, as counties are not given home rule powers by the state constitution. (Counties may obtain some local autonomy by adopting a charter pursuant to Ohio Constitution, article X, section 3). By statute county commissioners have been granted broad powers for the elimination of slum and blighted areas and for their renewal. OHIO REV. CODE §§ 303.26-.56 (Supp. 1961). However, the powers of a county are expressly limited to areas outside of the corporate limits of any municipality. OHIO REV. CODE § 303.26 (Supp. 1961). To this date there has been no urban renewal project put into execution by an Ohio county.

responding duties of fulfilling the responsibilities of government and of meeting the needs of the municipality. The people, by vesting such power in each municipality, necessarily put upon each the duty to govern itself according to its individual and particular needs in its local affairs. No city or legislative body thereof can properly look to the state legislature or to other agencies to solve its own problems. The very force of these duties and responsibilities requires that each municipality and its legislative body shall undertake and carry out all measures determined necessary to promote and to preserve the welfare of the community.[12]

It cannot be emphasized too often or too strongly that Ohio municipalities have at hand, and within the powers given by direct constitutional grant, the tools of government needed to plan and to put into effect programs and activities that will combat the forces which have produced urban blight, and which will continue to produce it if not arrested.

The legislative power of the state, as to matters of municipal local self-government, that has been vested in municipalities includes the power to employ all of the means of government that may be suitable for accomplishing public purposes and promoting the health, welfare, and economy of the inhabitants, subject only to limitations constitutionally imposed. There exists not only the power to make legislative decisions of policy and determinations of the objectives to be attained, but also the power to select the methods by which those objectives will be attained. Only by the recognition by municipalities of their responsibilities for local self-government and by wise action to meet those responsibilities, will intervention by superior authority be avoided.

The decisions referred to above establish that municipalities in Ohio may determine what is needed for the public welfare, and to implement such determination, may expend public funds, levy taxes, borrow money, acquire property by purchase or by eminent domain, dispose of property, and construct public improvements. They may also regulate the use of land by zoning, subdivision regulation, building codes and the like; they may plan for municipal development and growth; and they may, by direct action, acquire blighted areas and resell the land for orderly development. By agreement with other municipalities, for mutual advantage, they can jointly undertake projects in which they have a common beneficial interest[13] and develop plans for community growth and

12. *Cf.* State *ex rel.* City of Toledo v. Weiler, 101 Ohio St. 123, 128 N.E. 88 (1920), where, concerning the use of the borrowing power, the court held, in the third syllabus: "Each municipality assumes responsibility consonant with the authority conferred, and is not only permitted but required to determine for itself the portion of its taxing and debt incurring power which shall be used for any authorized municipal purpose, within such constitutional and legislative limitation."

13. The power to carry out cooperative undertakings does not depend upon statutory authority (such as, for example, OHIO REV. CODE § 715.02) but is derived from the constitution. This point was decided in unreported decisions of the Court of Common Pleas and

elimination or prevention of blight so that future development in no one of them will impair orderly and sound planning and development in others.

This power of cooperation can be profitably employed today in several critical areas, namely, water supply, storm and sanitary sewers, and mass transportation. For example, substantial federal aid is now provided to help solve the problems of mass transportation in metropolitan centers.[14] Municipalities in Ohio which are alert may take prompt advantage of this aid without any new enabling state legislation.[15] In many metropolitan areas, however, adequate provision cannot economically be made to serve the needs of the people without greater municipal cooperation.

As the problems of municipalities and metropolitan areas increase with growing density of population and with ever expanding sprawl, it does not seem unreasonable to predict that unless municipal corporations use effectively their extensive powers to fulfill their duty to govern, the state or the federal government, or both, will feel compelled to act. Ohio cities and villages have an unusual opportunity to meet the challenge. The tools of government are there; all that is needed is wise and courageous leadership, sound planning, and the will to accomplish.

## LIMITATIONS ON MUNICIPAL POWER

The only limitations upon the exercise of "all powers of local self-government" are those directly made by the constitution or those directly authorized by the constitution to be made by the General Assembly. These may be grouped as follows.

(1) Municipal powers may be exercised only for public purposes,[16] and must be exercised in the area of local self-government.[17]

(2) Municipalities may not lend their aid or credit to private persons or corporations.[18] But this limitation is not violated by the

---

the Court of Appeals of Lake County in R. C. Young & Associates v. City of Eastlake. Appeal was dismissed for want of a debatable constitutional question, inasmuch as the action was not brought within the time limit of OHIO REV. CODE § 733.60. 166 Ohio St. 476, 143 N.E.2d 701 (1957). See 3 FARRELL-ELLIS, OHIO MUNICIPAL CODE § 5.3 (11th ed. 1962).

14. Housing Act of 1961, 75 STAT. 149, 165-66, 173-74, amending 42 U.S.C.A. § 1453, 40 U.S.C.A. § 461, 42 U.S.C.A. § 1492 (Supp. 1961).

15. Special provision is made in the Ohio Constitution, article XVIII, section 4, for municipalities to acquire, construct, own, lease, and operate public utilities and to contract with others for public utility products or services.

16. Loan Ass'n v. Topeka, 87 U.S. 655 (1875); City of Cleveland v. Ruple, 130 Ohio St. 465, 200 N.E. 507 (1936).

17. Village of Beachwood v. Board of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958).

18. OHIO CONST. art. VIII, § 6; Village of Brewster v. Hill, 128 Ohio St. 343, 190 N.E. 766 (1934). It should be observed that the constitutional prohibition is against the enactment of laws authorizing municipalties and others to lend aid or credit. The court appar-

process of acquiring and clearing slum and blighted areas and reselling to developers.[19] This is so, even if a city has already contracted to sell the land to a developer prior to its acquisition.[20]

(3) Regulatory ordinances must be reasonable and have a substantial relationship to the health, morals, safety, or welfare of the people.[21]

(4) In the taking of private property for public purposes, compensation must be paid, and it must be assessed without deduction for benefits to any property of the owner.[22] It was formerly held by the Ohio Supreme Court that this forbade the taking of private property except for use by the public.[23] However, when it sustained the power to acquire, clear, and redevelop slum property, the court limited its decision in *Pontiac Improvement Company v. Board of Commissioners*,[24] and gave greater weight to the language of the constitutional provision, which reads, "private property shall ever be held inviolate but subservient to the public welfare."[25] There is no language in the constitution prohibiting the taking of private property except for use by the public.

(5) Exemption of property from taxation is controlled by article XII of the Ohio Constitution. Municipalities are not granted the power to make exemptions from taxation of property taxed according to value. Accordingly, they may not provide tax exemption to encourage owners to rehabilitate properties in deteriorating areas or to build housing for low or middle income groups in areas cleared for redevolpment, nor may the legislature authorize exemption of such property.[26]

(6) Some municipalities have limitations imposed in their own charters adopted under article XVIII, section 7 of the Ohio Constitution,

---

ently recognized the difficulty in applying this limitation to an ordinance passed under the home rule power, but concluded that the spirit, if not the letter, of the constitution would be violated.

19. State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

20. Grisanti v. City of Cleveland, 181 N.E.2d 299 (Ohio Ct. App. 1962), *affirming* 179 N.E.2d 798 (Ohio C.P. 1961), *appeal dismissed,* 173 Ohio St. 386, 182 N.E.2d 568 (1962), *appeal docketed,* No. 353, U.S., Aug. 20, 1962. See note 38 *infra* and accompanying text where this important case is discussed in greater detail.

21. City of Akron v. Klein, 171 Ohio St. 207, 168 N.E.2d 564 (1960).

22. OHIO CONST. art. I, § 19.

23. Pontiac Improvement Co. v. Board of Comm'rs, 104 Ohio St. 447, 135 N.E. 635 (1922).

24. *Ibid.*

25. OHIO CONST. art. I, § 19, State *ex rel.* Bruestte v. Rich, note 19 *supra.*

26. The Ohio Constitution permits exemption from ad valorem taxes only for burying grounds, public school houses, houses used exclusively for charitable purposes, and public property used exclusively for any public purpose. OHIO CONST. art. XII, § 2. Even public property, when used for private purposes, may not be exempted by the legislature. Denison University v. Board of Tax Appeals, 173 Ohio St. 429, 183 N.E.2d 773 (1962). But as to excise taxes, municipalities have the power to determine the subject matter and reasonable classifications, except where limited by statute pursuant to the express grant of power conferred by article XIII, section 6, and article XVIII, section 13, of the Ohio Constitution. Angell v. Toledo, 153 Ohio St. 179, 91 N.E.2d 250 (1950).

which restrict officials in planning, developing, and carrying out urban renewal projects and other public improvements, or which restrict the borrowing power or the power to spend money.[27] Such restrictions are self-imposed by the community in question. In some municipalities, a charter amendment conferring greater power on the elected or appointed officials, or removing burdensome or prohibitive restrictions, may be required in order to permit effective urban renewal projects.

(7) Article XVIII, section 3, of the Ohio Constitution requires that local police, sanitary and similar regulations shall not conflict with general laws enacted by the General Assembly. The determination to acquire all of the property in a blighted area in order adequately to deal with and eliminate the blight, and then to dispose of the land for redevelopment under a plan designed to prevent the recurrence of blight, is an exercise of one or more of the powers of local self-government. These activities are free from legislative control as to purpose, and are not "regulations" which could be in conflict with general laws.[28]

(8) The constitution expressly authorizes in article XVIII, section 13, and article XIII, section 6, the enactment of laws to limit the power of municipalities to levy taxes and incur debts for local purposes, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power. This does not authorize the General Assembly to control the activities for which municipalities may borrow money within debt limits.[29] Nor does it authorize a statute prohibiting a municipality from borrowing money or from issuing obligations that do not constitute debt.[30] Thus, municipalities, within debt limitations, may issue general obligation bonds to finance urban renewal projects.[31]

Municipalities also may issue special obligations not constituting debt, which do not pledge the credit or faith of the municipality. It has been customary to use this type of financing for urban renewal projects undertaken in conjunction with federal aid authorized by the Housing Act of 1949, as amended.[32] Special circumstances have arisen where even such obligations in their customary form could not be issued with-

27. *Cf.* City of Sandusky v. City Comm'n, 56 Ohio App. 284, 11 N.E.2d 115, *appeal dismissed*, 132 Ohio St. 554, 9 N.E.2d 505 (1937).

28. State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

29. State *ex rel.* City of Toledo v. Weiler, 101 Ohio St. 123, 128 N.E. 88 (1920).

30. State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953); State *ex rel.* Gordon v. Rhodes, 158 Ohio St. 129, 107 N.E.2d 206 (1952); State *ex rel.* Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951).

31. Additional leeway is given by the provision that voted bonds for such purpose, not in excess of two per cent of the tax duplicate valuation of the municipality, are totally excluded in determining the statutory debt limitation. OHIO REV. CODE § 133.03.

32. State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

out the creation of a debt, but methods have been devised to solve the problem.

(9) Municipal powers may not be exercised in such a way as to interfere with the state in the exercise of state functions.[33] This limitation is one of importance and must be carefully considered in the planning of municipal projects and development so that they take into consideration highway and other improvements made or to be made by the state.

These limitations are not as imposing as they may seem to be.[34] Municipalities, with their immense power of self-government, have been able to plan and carry out urban renewal projects. Consideration of the powers of government available clearly indicates that the means are at hand, or can be developed as needed, to permit urban areas to attain, through comprehensive and creative planning and effective regulations and execution, conditions of living, working, and recreation that are acceptable to meet the standards of our citizens today.

## Powers of Municipalities to Effect Land Use Control

Under the grant of home rule power in Ohio, municipalities have all the powers of local self-government. Particular powers are not set forth. The comprehensive language of the grant necessarily means that municipalities have, and may exercise, all of the powers and tools of government to accomplish the purposes of local self-government, except only as limited by express constitutional or constitutionally imposed restraints.

### *Specific Powers and Procedures*

Thus, municipalities have the full power to plan their own development. This includes the power to make plans and maps of the corporation showing the general location and character of streets and other public ways, parks, playgrounds and other public grounds, open spaces, public buildings and public property, the general location of public and private utilities, the general character of uses in the different areas of the municipality, and the criteria or standards for design and construction of

33. City of Lakewood v. Thormyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960); State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345 (1952); State *ex rel.* Ellis v. Blakemore, 116 Ohio St. 650, 157 N.E. 330 (1927).

34. It will be noted that only the last three limitations involve interference by the General Assembly. As to matters of procedure, except where charters adopted under article XVIII, section 7, of the constitution otherwise make provision, municipalities are to govern themselves in the method prescribed by statute pursuant to article XVIII, section 2. Morris v. Roseman, 162 Ohio St. 447, 123 N.E.2d 419 (1954). However, the substantive home rule powers exist, whether or not a charter has been adopted. Perrysburg v. Ridgeway, 108 Ohio St. 245, 140 N.E. 595 (1923).

improvements. It is generally the function of a planning commission to develop such a plan and make recommendations to the legislative authority. Provision is made by statute for city and village planning commissions.[35]

The objective of creating a plan which deals fairly and effectively with the community and with present conditions, and which will also, to the maximum extent possible, contemplate future demands, can be most nearly approached only if there is consultation with and advice from professional planners, lawyers skilled in public law, consulting engineers, leaders in the community's business, commercial, and financial affairs, leaders in education, public housing, welfare, and recreation, and administrators in charge of other government agencies having power to act in the area.

Closely related to the function of planning is the zoning of a municipality under which districts are created for various uses of buildings and other structures and premises. The Ohio statutes which are operative, absent contrary charter provisions, vest the duty of developing zoning in the planning commission, but the adoption of zoning must be by ordinance of the legislative authority of the municipality.[36]

Also closely related to the function of planning is the power to impose restrictions on the subdividing of land within the municipality. Most of the procedures for non-charter municipalities are set forth in Ohio Revised Code chapter 711. Different procedures are available for charter municipalities. However, in either case, the substantive power of imposing regulations is granted as a part of the home rule power, subject to the qualification that such regulations must not conflict with regulations imposed by the general laws of the state.

In the development of urban renewal projects, the power to acquire and dispose of property is essential. It has been seen that Ohio municipalities have such power as part of their local self-government. Absent charter provisions, statutory procedures for the exercise of the powers will be applicable. This is one of the reasons for the amendment in 1961 of the Ohio statutes so as to exempt such properties from the requirement of competitive bidding when the property is sold or leased.[37]

---

35. OHIO REV. CODE, ch. 713; but a municipal charter may make different provisions.

36. See OHIO REV. CODE §§ 713.07-.15. The result of zoning is, of course, to restrain the free use of land and to take away from land owners certain rights that would otherwise exist for the use and development of their properties. This invasion is not the taking of property without due process of law, nor a taking for which compensation must be made as long as the zoning ordinance is not unreasonable and arbitrary. City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925).

37. OHIO REV. CODE, § 721.28 (Supp. 1961), enacted by 129 OHIO LAWS, Senate Bill No. 490, effective June 12, (1961). This was passed as a companion measure to the act which repealed the Ohio urban renewal statute. 129 OHIO LAWS, Senate Bill No. 254, *supra* note 9.

The acquisition of undeveloped land for future development, for open spaces, or for its preservation for public purposes against encroachment, also falls within the first clause of article XVIII, section 3, of the constitution. With regard to this relatively new and as yet undefined field of "open spaces," Ohio municipalities are in an unusual, and possibly a unique, position. To the extent that an open space program is developed within constitutional limitations and for purposes serving the public or the public welfare, municipalities in Ohio can put such programs into complete execution without waiting for any statutory authority and without having any statutory restrictions or definitions placed on the purposes. They also have the ability to adapt their procedures and programs so as to take full advantage of federal aid. Moreover, they have the ability to comply with changing federal policies and regulations without the delays or difficulties that would be encountered if statutory amendments were necessary in this rapidly developing field.

These powers of a municipality are so great that extreme care must be taken to protect the rights of citizens and property owners and to be sure that the municipality's plans give full and fair recognition both to the public welfare and to the legitimate interests of the individual.

## *Exercise of Municipal Powers in Land Use Controls*

### *Urban Renewal*

Of great significance is the recently established power of an Ohio municipal legislative body to determine the existence of blight and the need for an urban renewal project. It was held in *Grisanti v. City of Cleveland*[38] that the determination by the council of the City of Cleveland, its legislative body, that a particular area is "not only a blighted, deteriorated and deteriorating area but is also a slum area detrimental to and a menace to the public safety, health, morals, and general welfare. * * *"[39] is conclusive upon the courts in the absence of fraud and bad faith. As the municipal legislative body is exercising the legislative authority of the State of Ohio, its determination of blight precludes the re-examination of this question by the courts, and evidence to show that council's determination is erroneous is properly excluded.

The court of appeals in *Grisanti* pointed out that there is a substantial distinction between cases involving solely the police power and cases involving what is commonly referred to as a governmental purpose in

38. 181 N.E.2d 299 (Ohio Ct. App. 1962), *affirming* 179 N.E.2d 798 (Ohio C.P. 1961), *appeal dismissed,* 173 Ohio St. 386, 182 N.E.2d 568 (1962), *appeal docketed,* No. 353, U.S., Aug. 20, 1962. This case involved Cleveland's major downtown urban renewal project known as Erieview I.

39. 179 N.E.2d at 807.

the public interest. The court held that the urban renewal project before it was a public purpose in the nature of self-improvement under the city's plan of urban renewal. The court concluded:

> Thus it is clear that there is a real difference between a court's examination of a legislative determination to see if it is "clearly erroneous" as in police power cases, and the substitution of its judgment for that of the legislative body on a showing of fraud or gross abuse of discretion when passing upon the validity of legislative action to carry on public improvements in the interest of public welfare.[40]

*Zoning and Restrictive Covenants*

Traditionally, under the common law in this country and under the state and federal constitutions, owners of property could do as they pleased with it as long as they did not directly injure others in their persons or property. Before the advent of modern zoning, owners were primarily subject only to rules which had grown up under the doctrine of nuisance. Any use — or non-use — was the concern only of the owner, unless there was some sufficiently serious and obnoxious direct effect upon his neighbor (private nuisance) or his neighborhood (public nuisance).

Undesirable, unsightly, and unpleasant uses appear to have been equally legal in the open countryside, in the remote wilderness, and in the town and large city, as long as the rules against nuisance were not violated. Thus, commercial and manufacturing enterprises grew up side by side with residences. The commercial and manufacturing developments were but the exercise of rights of ownership in land which every owner enjoyed.

As urban areas became larger, as more people became offended, and as more were adversely affected by conditions of land use regarded as undesirable, we saw the origin and evolution of modern zoning.[41]

Zoning is a negative restraint, as is the law against nuisances, but zoning goes much further. Under zoning, the power of government is used to permit or forbid various types of land uses. This is accomplished under the so-called "police power" without compensation to the owners of lands whose full use is restricted by the ordinances. Municipal officials are enabled to plan for the future, and to project areas for future development consistent with concepts of safe and decent living.

However, either because the concept of zoning came into being so late, or because of the non-enforcement of zoning ordinances and related building codes, or because of lack of good planning, or for all of these reasons, and perhaps others, regulations of land use by prohibition

40. 181 N.E.2d at 303.

41. See City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

did not prevent the development in cities of conditions that are, by general consensus, deemed to be contrary to the general welfare. Residential slums continued, grew, and became increasing menaces to the people, both those within the slums and those outside its borders. Commercial and industrial activities continued, have spread, and all too frequently have become blighted.

It is now accepted that true slums may be dealt with by direct governmental intervention, as both regulatory laws and private efforts have been found to be inadequate. There has been a growing acceptance of the idea that non-slum blight may also be the subject of direct governmental action and that the people of a community do not have to permit such blight to continue in their midst until properties become so utterly defective that they can be closed and razed as nuisances.

One result of major significance in this direct approach will be to supplement the zoning control of broad areas, by the control of specific parcels of land for specific uses through contractual obligations imposed on owners. We may well be on the way to substituting for zoning in much of our urban areas, such contractual arrangements, which will become enforceable as covenants running with the land. It is of interest that the prediction was made at the sessions on Urban Renewal and Housing of the Practicing Law Institute held in New York City in June, 1962, that we will see the day when almost every real estate transaction in our urban areas will be part of some urban renewal project. If that be true, municipalities will assume control of particular uses of properties considered individually, rather than general uses in general areas.

Non-conforming uses have given the courts great difficulty. It was not considered a violation of constitutional rights to prohibit commercial or industrial development on vacant land under a properly drawn zoning ordinance. However, where land has been improved and is used for lawful commercial or industrial purposes, it is natural that there would be a different approach by the courts because of the substantial economic investments that had been made on the land. An effort to solve this problem is being made through ordinances that establish amortization periods for non-conforming uses and prohibit the non-conforming use after the expiration of the period. The constitutionality of this approach has been sustained in some states,[42] but rejected in others.[43]

42. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929); Grant v. Mayor & City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957).

43. City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953); Town of Somers v. Camarco Contractors, Inc., 205 N.Y.S2d 724 (Sup. Ct. 1960), *affirmed,* 12 App. Div. 2d 977, 214 N.Y.S.2d 650, *modified and leave to appeal denied,* 13 App. Div.2d 531, 215 N.Y.S.2d 745 (2d Dep't 1961). *But see* Harbison v. City of Buffalo, 176 N.Y.S.2d 598 (Ct. App. 1958).

In Ohio, an ordinance terminating the right to continue a non-conforming use after a period determined by the city council to have been reasonable was held to be invalid in *City of Akron v. Chapman.*[44] The court concluded that the ordinance, depriving the defendant of "a continued lawful use" of his property, was violative of the due process clause of the state and federal constitutions. This case involved a junk-yard. There may be a difference in treatment between uses which are extremely offensive but which are not nuisances, and uses non-conforming to the neighborhood but not extremely offensive. It would seem, however, that the legislative power to provide for the development and growth of a municipality does include the power to eliminate non-conforming uses which are incompatible with area developments.

In a later case, *City of Akron v. Klein,*[45] the court held invalid restrictions on the use of the same junk-yard involved in the *Chapman* case. There are, however, suggestions by Judge Taft that would lead to either of two possible conclusions: namely that the municipal legislative body could prohibit the continuing use if it determined that such a business is always a nuisance in a residential neighborhood, or that it could condemn the property and pay the owner the fair value. Where the benefit to the public is great enough, absolute prohibition without compensation may well be valid. This approach seems to have been taken in several states.[46]

An approach that seems to be more consistent with fairness and justice is that the owner of a non-conforming use, lawful when it was established, should not bear the economic loss of its abolition for the benefit of neighboring properties, but that the public, which seeks the change to improve municipal conditions, should assume the economic burden and should compensate the owner.

*Redevelopment of Individual Land Tracts*

This treatment of isolated non-conforming uses appropriately suggests the possibility of dealing individually with structures which are not non-conforming under zoning but are detrimental to the public welfare because of existing blighted condition, or because of deteriorating conditions which if not arrested will result in blight. These structures may be located within the limits of an area for which an urban re-

44. 160 Ohio St. 382, 116 N.E.2d 697 (1953).

45. 171 Ohio St. 207, 168 N.E.2d 564 (1960).

46. Levine v. Board of Adjustment, 125 Conn. 478, 7 A.2d 222 (1939) (junk yard); Calkins v. Ponca City, 89 Okla. 100, 214 Pac. 188 (1923) (dilapidated buildings); Shepard v. City of Seattle, 59 Wash. 363, 109 Pac. 1067 (1910) (insane asylum). The rationale of the *Seattle* case is that an insane asylum in a residential portion of a city would practically destroy the value of all the property within its immediate vicinity for residential purposes. If this is the controlling factor then any non-conforming use substantially affecting the value of the adjoining property for residential purposes may well be subject to prohibition.

newal plan has been developed, or they may be scattered. Some may be in parts of the municipality for which it will never be necessary to project an urban renewal plan involving mass acquisition and redevelopment.

The reported cases deal with municipal plans covering blighted areas of substantial geographical extent, attacking the problem on an area basis. The courts have sustained the direct acquisition of property and elimination of such blighted areas by demolition as being a public purpose. As areas get smaller, it may became more difficult to establish public purpose. Stated another way, it may become easier to establish that the project is one to aid private enterprise rather than to accomplish a public purpose. However, where the proceedings can be shown to be for the public welfare and the public purpose is established, there seems to be no valid reason for questioning the acquisition of a small blighted area and its subsequent redevelopment after clearance by the municipality.

Is there, then, any legal objection to dealing with individual properties which threaten the public welfare and exert a depressing influence upon a neighborhood which otherwise conforms to the standards of the community? It is submitted that the requirement of public purpose can be satisfied whether a large area is treated with a broad brush, or whether a small area or individual properties are the subject of the public program. No reported cases have been noted in which the courts have passed on this question. However, the legality of this approach is given considerable support by the opinion of the Supreme Court in *Berman v. Parker.*[47] The Court said:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.[48]

In Ohio, a municipal council exercises the legislative authority of the state as to local government. Its determination, legislatively, that particular property is blighted and deteriorated, or is deteriorating, and must be removed or reconditioned to protect or advance the public welfare, will establish the public purpose. Such a determination, under the principles applied in *Grisanti,*[49] is not subject to veto by the judiciary, absent fraud or bad faith.

It is not suggested that a municipality may, or should, undertake piece-meal condemnation of homes or commercial or industrial proper-

47. 348 U.S. 26 (1954).

48. *Id.* at 35-36.

49. *Supra* notes 20, 38.

ties for resale to private persons or corporations for redevelopment by the latter for private purposes, without first having developed a general plan for the community, or a part of it, looking toward the elimination of adverse conditions of blight. Without such a plan it may be difficult or impossible to sustain a particular acquisition as being for a public purpose.

*Conserving Open Spaces*

The rather nebulous concepts of municipal planners and others who have studied the problems of a metropolitan concentration of population, with regard to the open space land program, have been to some extent formalized by the enactment of Title VII, Open Space Land, of the Housing Act of 1961.[50] Congress found that the rapid expansion of the nation's urban areas has created critical problems of service and finance for all levels of government and threatens severe problems of urban and suburban living, including the loss of valuable open space land in such areas. Congress determined that the purpose of this measure is

> . . . to help curb urban sprawl and prevent the spread of urban blight and deterioration, to encourage more economic and desirable urban development, and to help provide necessary recreational, conservation, and scenic areas by assisting State and local governments in taking prompt action to preserve open-space land which is essential to the proper long-range development and welfare of the Nation's urban areas, in accordance with plans for the allocation of such land for open-space purposes.[51]

Most of the specific purposes stated in the federal statutes are well within the sphere of established municipal powers. In section 706(1) of Title VII, open space land is defined to mean

> . . . any undeveloped or predominantly undeveloped land in an urban area which has value for (A) park and recreational purposes, (B) conservation of land and other natural resources, or (C) historic or scenic purposes.[52]

Park and recreational purposes and historic sites do not seem to raise any new problems. The acquisition of land for scenic purposes as dis-

50. 75 STAT. 183, 42 U.S.C.A. §§ 1500-1500e (Supp. 1961). The testimony before the congressional committees indicates a great variety of views as to the reasons for having open space and the purposes for which open space areas are to be devoted. See Housing Legislation of 1961, *Hearings Before the Subcommittee on Housing of the Senate Committee on Banking and Currency*, 87th Cong., 1st Sess., 12-13, 116-46, 321, 528, 558, 572, 593-96, 606-07, 679, 694-95, 709-10, 901-02, 920-21, 995-1049 (1961); *Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency*, 87th Cong., 1st Sess., 18-21, 52-53, 142-43, 202-04, 344-45, 464-66, 500, 776-77, 795-96, 862, 869-72 (1961). See also 107 CONG. REC. 10143, 10148, 10337-40 (daily ed. June 21, 22, 1961); S. REP. NO. 281, CONF. REP. NO. 602, 87th Cong., 1st Sess. (1961).

51. 75 STAT. 183, 42 U.S.C.A. § 1500(b) (Supp. 1961).

52. 75 STAT. 185, 42 U.S.C.A. § 1500e(1) (Supp. 1961).

tinguished from park purposes may become debatable. The remaining purpose stated by Congress opens up an intangible and undefined area. This relates to land which has value for "conservation of land" and conservation of "other natural resources."

Conservation of land as a complete end in itself, and as the ultimate purpose of the acquisition of land, would seem to fall short of the standards by which the courts will measure whether a public project is a public purpose. It would seem that the conservation of land must be for some specific purpose and for the public welfare. The acquisition of land or the imposition of restrictions on land in order to create so-called land banks or to control development or to prevent development until municipal plans have materialized, will present basic problems of public purpose.[53]

However, the acquisition of land correlated to projects or programs serving the public welfare will unquestionably be planned as a part of overall municipal development. Some of the particular purposes for which land acquisition of this character is determined to be necessary may reasonably be questioned in the courts as to whether the purpose is beyond municipal legislative powers. In this area, it should again be noted that Ohio municipalities are free to program and to pioneer in the development of open space land where it serves public purposes. This results from the complete delegation of the legislative power of the state to municipalities in all matters of local self-government. No statutes are necessary.

An example of the difficulties of a local agency operating only under statutory authority to develop an open space program arose in Ohio in 1922. The Ohio Supreme Court held that a board of park commissioners, an *ad hoc* statutory agency of government organized to construct and improve parks, did not have authority to restrict the use of adjoining lands by an eminent domain proceeding, so that the owners would not be able to develop and improve their lands without restriction and in ways deemed by the park board to be inimical to its park development.[54] The right sought to be acquired included the right to regulate and control planting and floral decorations, the right of the park board to enter the premises for the purpose of planting slopes and hillsides, the right to regulate and control grading and filling, the right to lay, repair, keep, and maintain drains as might be suitable to prevent surface water from creating swampy conditions, the right to prevent sewage or foul airs

---

53. For a fuller discussion of some of the problems involved see Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas,* 110 U. PA. L. REV. 179 (1961); Note, *Techniques for Preserving Open Spaces,* 75 HARV. L. REV. 1622 (1962).

54. Pontiac Improvement Co. v. Board of Comm'rs, 104 Ohio St. 447, 135 N.E. 635 (1922).

from being emitted upon lands of the park board, and the right to prevent the erection or maintenance of any building, structure, fence, or wall on the slopes and hillsides of the premises. The court denied the power to appropriate, upon two grounds: (1) the land of the private owners was not being taken for a use by the public or one open to the public, and (2) the statutes authorizing the board to appropriate property did not confer the right to appropriate the easements or interests in the land of the character described. This holding that the Ohio Constitution contemplates physical possession and use of the property by the public has been limited by the Ohio Supreme Court in its decision sustaining the power of urban renewal.[55] It seems entirely likely that the court will sustain on constitutional grounds restrictions on private development that is harmful to the public welfare, and that the *Pontiac* case will be further limited.[56]

The leading case of *Cincinnati v. Vester*[57] is not adverse to the power to acquire open spaces where the purpose is defined and the taking is for a public purpose. That case involved excess appropriation of lands over that actually to be occupied by the proposed improvement. Permanent injunctions restraining the appropriations were affirmed by the Supreme Court. The rationale of the opinion is that the taking of the excess was a taking under an ordinance which was not specific as to the use for which the property was being taken, but simply declared that it was "in furtherance of the public use."[58] The Court held that it was not enough that the property to be taken might at some future date be devoted to a public use, to be then determined by council and for which there could then be an appropriate condemnation. The Court held that in the absence of a definition of the purpose, the appropriation must fail because of non-compliance with a statutory requirement that the council's determination of intention to appropriate must define the purpose of the taking.

The case, therefore, cannot stand as authority for the proposition that when lands are appropriated for a particular purpose, adjoining lands may not be appropriated for other purposes in conformity with a municipality's plan of development. It does emphasize, however, the necessity that municipal planners and municipal legislative bodies fully state the purpose for which open space or excess lands are to be acquired, and that such statement disclose that a public purpose is involved.

---

55. State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

56. The case also is an important illustration of the contrast between the authority of an agency of delegated power and an Ohio municipal corporation.

57. 281 U.S. 439 (1930).

58. *Id.* at 443.

## CONCLUSION

The complete delegation of municipal home rule powers means that each municipality has the same constitutional power as all others, and none can directly control the accomplishment of its neighbor's objectives of government or plans or improvements. For example, a central city may not, in developing a major airport, condemn the streets of its neighboring suburb for the purposes of the airport irrespective of the comparative value and utility to the public of the two different improvements.[59]

On the other hand, each can indirectly interfere with its neighbor's welfare and planning. Thus, an extensive apartment house development in one city along its boundary line with another was the determining factor in holding that the zoning by the neighboring municipality of the adjacent property for single or two family residence purposes was arbitrary, unreasonable, and beyond the zoning power of the city because it was violative of the constitutional rights of the property owners.[60] There was no discussion in the opinion of either the trial court or the court of appeals as to the home rule power of Shaker Heights, in which the plaintiff's property was located, to plan and control the land use within the city, irrespective of the uses permitted across the boundary line in the City of Cleveland.

This points up the responsibility of each municipality to its neighbors in planning and controlling land use. It emphasizes the necessity for cooperative studies of problems affecting the welfare of two or more municipalties in a metropolitan area and for cooperative seeking of adequate solutions.

In defining the objectives of government and in determining what will best serve the public welfare of the community, Ohio municipalities have a freedom of choice that does not seem to exist in any other state. It cannot be said that municipalties are unable to plan and carry out their objectives because of inadequate legislation or because the legislature, dominated by the rural representatives, will not pass enabling legislation. Ohio municipalities are not hampered by want of statutory authority. They have the power to determine for themselves the objectives of their government, and they have at hand the legal powers of government to carry out those objectives. Aside from the constitutional limitations imposed or authorized by the Ohio Constitution, the only limitations on municipal freedom of choice, and initiative and enterprise in determining and carrying out the objective of local self-government, are to be found in lack of local leadership and aggressiveness, or in self-imposed charter

59. Village of Blue Ash v. City of Cincinnati, 173 Ohio St. 345, 182 N.E.2d 557 (1962).
60. Shaker Coventry Corp. v. Shaker Heights Bd. of Zoning Appeals, 180 N.E.2d 27 (Ohio Ct. App.), *appeal dismissed,* 173 Ohio St. 572 (1962).

limitations. Many municipalities have adopted charters for their government under article XVIII, section 7, of the state constitution and exercise thereunder all powers of local self-government subject to the provisions of article XVIII, section 3. Some of these charters restrict the officials from undertaking and carrying out improvements without a vote of the electors or contain other restrictions making some projects difficult of accomplishment. Others require compliance with restrictive state statutes. But many others vest broadly in the municipal officials and legislative body the power to exercise all powers of the municipality.

The point is that restrictions on the freedom of choice in Ohio municipalities are the result of local decision, and that the form of government need not be an obstacle to the achievement of the substantive objectives of local government. In the solution of municipal problems in Ohio, there is, therefore, the unusual opportunity to explore all new avenues, to plan for community growth and welfare, and to protect the inhabitants from undesirable, unhealthy, uneconomical, and ugly development.

Urban renewal in its broadest sense foreshadows an era in government control over land use that will extend far beyond traditional patterns. Further, we are on the borders of new developments as we seek solutions to the growing problems resulting from the great concentration of population. Some of the problems are not new, but only in recent years has there been an acceptance that older modes of regulation are insufficient to do the job.

As new solutions are developed along the frontiers of land use control, there undoubtedly will arise situations involving judicial determination of the validity of projects or programs. In some situations such favorable decisions may be necessary to permit financing. However, the response of the law courts in the application of common-law principles to changing needs of society again demonstrates the vitality of the common law. And the many decisions sustaining the newer approaches again prove that the concept of public purpose, although incapable of precise definition, is really but a short way of saying that whatever the public needs for its welfare, the public will have.